

D.P.U. 91-DS-49

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Umbro & Sons Construction Co.

APPEARANCES: Edward J. Quinlan, Esq.
990 Washington Street
Dedham, Massachusetts 02026
FOR: UMBRO & SONS CONSTRUCTION CO.
Respondent

Bob Smallcomb, Acting Director
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On August 26, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Umbro & Sons Construction Co. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on July 8, 1991 at 125 Pearl Street, Boston, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precaution, causing damage to an underground service line by Boston Gas Company ("Boston Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on September 18, 1991, or send a written reply to the Department by that date.

On September 30, 1991, the Respondent met with the Division during an informal conference. In a letter dated November 19, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On November 25, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on January 21, 1993 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Robert Smallcomb, Acting Director of the Division, appeared on behalf of the Division. James C. Giles, a special representative within the Company's legal services department, testified in behalf of the Division. Joseph Umbro, a superintendent for the Respondent, and the person supervising the excavation in question, appeared on behalf of the

Respondent. All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division's Position

The Division alleges that the Respondent failed to use reasonable precautions while excavating at 125 Pearl Street, Boston, which resulted in damage to an underground gas service line (Tr. at 5, 12; Exh. D-3).

The Division stated that the Respondent rendered proper Dig-Safe notification on May 13, 1991 (Tr. at 11-12; Exh. D-1). The Division also stated that the area requested to be marked by the Respondent was clearly marked when the Respondent began excavation (Tr. at 8; Exh. D-1).¹ The Division further stated that the Respondent was aware of the fragile condition of the trench walls before damage occurred, and contended that support for the trench walls and service at closer intervals may have avoided damage (Tr. at 65-66).

The Division contended that proper support for the walls of the Respondent's trench and the service line within that trench was not evident in the photographs presented by the Division (id. at 17-18; Exh. D-2, D-5). However, Mr. Giles testified that he had not taken the photographs presented by the Division, and was not present at the site when the photographs were taken (Tr. at 10, 32). Mr. Giles also admitted that he had no first-hand knowledge of the conditions of the site, and that the photographs indicated that the Company had performed excavations before

¹ Mr. Smallcomb and Mr. Giles testified that they had not visited 125 Pearl Street during the period surrounding the damage caused by the Respondent (Tr. at 16, 58). All of their statements and assertions were based on conversations with Company employees who were not called to testify. Therefore, Mr. Giles' and Mr. Smallcomb's testimony is strictly hearsay and can only be used in the Department's decision to support related evidence.

the photographs were taken (id. at 26, 32).

B. The Respondent's Position

Mr. Umbro testified that he was on the site during the damage and repair of the Company facility (id. at 46, 61). He also testified that the Respondent was replacing a water main when the adjacent gas service was damaged (id. at 40).² Mr. Umbro further testified that the gas service had been recently installed, and that the material in the trench surrounding the service was not properly compacted (id. at 40-41). Mr. Umbro contended that before damage occurred, the Respondent had supported the walls of the trench with wood bracing to prevent the walls of the trench from collapsing (id.). Mr. Umbro also contended that the bracing was "more than adequate" to prevent soil from falling into the trench (id. at 41).

Mr. Umbro contended that the Company's service was damaged when loose soil eroded from beneath a piece of recently installed asphalt and stone mixture at the top of one side of the trench, allowing that piece of asphalt to break off and fall on the Company service (id. at 44, 53-55). He also contended that the soil eroded and the asphalt fell simultaneously (id. at 60). He further contended that the piece of asphalt fell onto a portion of the service, causing the service to pull out of the coupling that connected it to a second service, and did not "sever" the service (id. at 44-45, 53). In support of his contention, Mr. Umbro stated that the Company repairs consisted only of the installation of a new coupling to reconnect the services (id. at 46).

Mr. Umbro contended that the Respondent was not aware of the poorly compacted soil

² Although the Respondent consistently refers to the damaged Company facility as a "main" in the record, the Company's reports refer to the damaged facility a "service." Accordingly, for the purposes of maintaining consistency within this Order, we will refer to the damaged facility as a service.

under the asphalt, or the possibility that the asphalt might fall until after the damage occurred (id. at 55, 60). He also contended that if the Respondent had been aware of the loose soil and weak asphalt, it would have installed additional bracing at that location (id. at 61). He testified that the Respondent had no reason to suspect that the soil was loose at this location, because the soil surrounding the previous 1,500 feet of the trench was adequately compacted (id. at 64-65). Mr. Umbro also testified that given the existing facts, he did not know of additional precautions the Respondent could have taken to avoid damage to underground facilities (id. at 64).

With respect to the photographs, the Respondent questioned the period in which the pictures were taken, and contended that support for the service and trench walls may have been removed before the pictures were taken (id. at 25-26).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc.,

D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed Corp, supra; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, supra, at 9; Fed. Corp., supra, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp, supra; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

IV. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to exercise reasonable precaution to protect underground facilities while excavating.

In addressing the issue of whether the Respondent used reasonable precautions during

excavation, the Division failed to provide a witness who had visited the site, unlike the Respondent. The Division's allegations that the Respondent did not properly support the walls of the trench and service were based on speculations made from photographs that were taken by a Company employee who was not present at the hearing. However, the Division's witness stated that the photographs showed that the Company had excavated before those photographs were taken, and could not testify as to when the photographs were taken. Further, the Respondent stated that any existing supports could have been removed before the photographs were taken. Finally, the Respondent rebutted the Division's allegations of improper support by explaining, in detail, the methods of support for the walls of the trench that had been used.

The Division also alleged that the Respondent had knowledge that the asphalt might fall before the damage occurred to the Company's facility. However, this allegation was directly controverted by the Respondent's testimony that the erosion of the soil beneath the piece of asphalt, and the collapsing of that piece of asphalt, occurred simultaneously, thus preventing an opportunity for the Respondent to observe and remedy the potential problem. In addition, the Respondent contended that it could not have known about the possibility of damage from improperly compacted soil because the soil in the first 1,500 feet of the excavation project was compacted properly.

Finally, the Division alleged that the Respondent should have provided additional support for the walls of the trench in the vicinity of the damage, and that "shoring" at closer intervals might have prevented damage. In responding to these allegations, the Respondent contended that the walls of the trench were well supported to prevent soil from eroding and causing damage to

the facility. The Respondent further stated that it was not aware of additional precautions it could have taken to avoid damage. In addition, the Division's allegation that the precaution of "shoring" at closer intervals might have prevented damage was not supported with an explanation from a witness who had visited the site and could explain how decreased intervals could have prevented damage. Because the Division did not have a witness who examined the existing shoring and support of the walls provided by the Respondent, the Division could not reasonably make a characterization of the existing support as insufficient. Accordingly, the Division has not presented additional precautions that the Respondent could have taken that would have protected the Company service from damage.

In specific instances where an allegation of a failure to exercise reasonable precautions has been made without demonstrating further precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra. In the instant case, the Division did not adequately demonstrate that the Respondent failed to exercise reasonable precaution when excavating at 125 Pearl Street, in Boston.

Accordingly, for all the above reasons, the Department finds that the Respondent did not fail to exercise reasonable precaution when excavating on July 8, 1991 at 125 Pearl Street, in Boston Massachusetts, and therefore, did not violate the Dig-Safe Law.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Umbro & Sons Construction Co. did not violate the Dig-Safe Law during excavation on July 8, 1991 at 125 Pearl Street, in Boston; and it is

ORDERED: That the NOPV against the Respondent be and is hereby Dismissed.

By Order of the Department,